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No. 00-645

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN DOE, ET AL.,

Petitioners,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should summary judgment in a Title IX suit brought against a school district for employee-to-student sexual harassment be governed by this Court's Title IX standards set forth in the 1998 decision in *Gebser v. Lago Vista Indep. Sch. Dist.*?

2. Can a party defeat a motion for summary judgment by manufacturing a factual dispute by introducing an affidavit contradicting his own deposition testimony?

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STATEMENT OF THE CASE

B. Factual Background

From 1983 to 1987, John McGrew, a third-grade teacher and Boy Scout troop leader at Joseph J. Rhoads Elementary School, sexually molested some of his male students.[1] McGrew was subsequently convicted in state court of one count of aggravated sexual assault and two counts of indecency with a child. Barbara Patrick was the principal of the school during the same time period.[2]

The court of appeals correctly found that Ms. Patrick was informed once (by student J.H.[3]) of an allegation of inappropriate sexual contact by McGrew. In that incident, Ms. Patrick arranged a meeting between the parent (Sandra Thomas), herself, and McGrew. "At some point,

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[1] Joseph J. Rhoads is an elementary school that is part of the Dallas Independent School District (hereinafter also referred to as the "DISD").

[2] As principal, Ms. Patrick was the instructional leader of her school and responsible for student discipline. Ms. Patrick had the authority to make *recommendations* regarding dismissal of employees assigned to her school. The court of appeals specifically stated it "assume[d] without deciding that Patrick was an official with the power to remedy discrimination on behalf of DISD for purposes of determining whether Patrick had actual notice of discrimination and acted with deliberate indifference." *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (hereinafter referred to as *Doe II*). Thus, the issue of whether or not Ms. Patrick's knowledge could create liability for the DISD has never been resolved, since the trial and appeals court both found no deliberate indifference and ended their analysis there.

[3] The student's initials are used to protect the identity of the child.

Patrick also asked J.H. to repeat his accusation to McGrew. During that meeting, Patrick and Thomas both asked McGrew directly if he had fondled J.H., and he denied it." *Doe II* at 387. Ms. Patrick informed Ms. Thomas that she would make sure J.H. was not sent back to McGrew's classroom. *Id.* at 388.

The trial court and court of appeals found that following the meeting with the parent:

> Patrick told McGrew that the accusation was very serious, and led him to understand that he should not repeat the behavior that made the child accuse him of abuse. McGrew remembers this warning somewhat differently: 'She told me the school does not put up with the kind of behavior I had been accused of and that if it really did take place, I would be dealt with.' Patrick also spoke to J.H.'s teacher, who confirmed she had sent him to McGrew's classroom with a note, and who stated that J.H. had not mentioned any misconduct by McGrew to her when he returned to her classroom.

Doe II at 388.

The following are examples of statements by petitioners in their petition that are not supported by evidence in the record. "Barbara Patrick . . . was invested by the school board with . . . the power to take actions that would end sexual abuse." Petition at 3. (There is no evidence in the record that the school board invested Ms. Patrick with any such authority). Petitioners repeatedly refer to two children (J.H. and D.D.P.) who told Ms. Patrick they had been fondled, when only one child (J.H.)

made such an allegation. *Doe II* at 387. Petitioners' version of Ms. Patrick's meeting with J.H., his mother, and later McGrew is not supported by any evidence in the record, and is contrary to the findings of both courts. *See infra.*[4]

Petitioners' claim that D.D.P. was "not allowed to refresh his recollection" is again outside of the record. *See infra.* In 1988, D.D.P. produced an affidavit for the police claiming McGrew fondled him four years earlier, which in part claimed he "went down to the office and told Ms. Patrick . . . about what happened." When asked in deposition to explain what that meant, D.D.P. explained that:

> [H]e told administrative staff in Patrick's office of McGrew's act, but that Patrick was actually in her office, talking on the phone, at the time. When asked 'You never actually had a conversation with Ms. Patrick about what Mr. McGrew did to you, did you?' D.D.P. answered, 'No.'

Doe II at 386-387. The trial court thereafter granted summary judgment on petitioners' § 1983 claims, and the court of appeals affirmed. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5th Cir. 1998) ("*Doe I*"). In remanding the Title IX claim, the court of appeals held:

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[4] Ms. Patrick never discouraged or pressured the mother, and never made it difficult to arrange a conference. *Doe II*, at 387-388. The record indicates Ms. Patrick called the boy's mother, met with the mother and the boy, then had McGrew join them, at which time the boy confronted McGrew with Ms. Patrick and his mother present. *Id.* Ms. Patrick never stated she "knew he had not done what he was accused of." Petition at 4. There is absolutely no evidence McGrew and the student were asked to meet "one on one." *Id.*

> In remanding this case for further proceedings, we in no way intend to suggest that summary judgment would be inappropriate if Defendants are able to demonstrate, as they did with respect to Plaintiffs' § 1983 claims, that no genuine issue of material fact exists with respect to Plaintiffs' Title IX claim. Indeed, given the factual development that took place in this case with respect to the § 1983 claims against DISD and Patrick, we can say that if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim.

Doe I, 153 F.3d at 220 n. 8, cited in *Doe II* at 382.[5] Upon the filing of respondent's motion for summary judgment on the remaining Title IX claim, petitioners created D.D.P.'s 1999 affidavit, claiming his deposition testimony (already considered by the trial court and the court of appeals for § 1983 purposes) was incorrect.[6] The trial court determined that this subsequent and contradictory affidavit was not sufficient to create a genuine issue of material fact, and granted summary judgment, which was affirmed by the court of appeals.

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[5] The case was remanded due to this Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

[6] Petitioners claimed D.D.P.'s 1988 affidavit was correct, not his deposition testimony. However, even if one were to look only at the 1988 affidavit, *arguendo*, it does not create a genuine issue of material fact, in that it never states specifically what he allegedly told Ms. Patrick, and his 1999 affidavit says he cannot now remember the events underlying his claims.

REASONS FOR DENYING THE WRIT

This Petition for Writ of Certiorari should be denied in all respects. There is no new or novel issue for this Court to consider. Nor does this case involve issues representing a split among our federal circuits. The Fifth Circuit's opinion is consistent with this Court's rulings on summary judgment standards as outlined in *Reeves v. Sanderson Plumbing Prod., Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000) and *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242 (1986). Moreover, the Fifth Circuit applied the proper standards for Title IX claims – those articulated by this Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). Indeed, conspicuously absent from petitioners' application is any reference to *Gebser*, which controls this Title IX case. Petitioners erroneously claim that the court of appeals' decision conflicts with the 8th Amendment decision in *Farmer v. Brennan*, 511 U.S. 825 (1984) and request this Court review a case factually similar to *Gebser*, and then to apply different standards under *Farmer*. This Court's prior decisions have thoroughly addressed summary judgment and Title IX standards and the lower courts had no problem applying those guidelines to this case. This case presents no new issues or statutory interpretations distinct from what this Court has decided in its prior decisions.

A. *Reeves v. Sanderson Plumbing Prods., Inc.*

Petitioners argue that the court of appeals considered the credibility of evidence in granting DISD's motion for

summary judgment, thus violating this Court's *Reeves*[7] standards for summary judgment motions brought pursuant to Federal Rule of Civil Procedure 56. Petitioners argue that it was erroneous for the lower courts to pursue "any sort of evidentiary analysis" of a witness' testimony when considering the Rule 56 motion. Petition at 8. While it is true that courts cannot resolve factual issues on summary judgment, courts do correctly engage in some analysis of the evidence. Federal Rule of Civil Procedure 56 empowers a court to make a threshold determination of whether a factual issue is "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court is not acting as a fact-finder when it makes such determinations, as this is a question of law.[8]

Not every alleged factual conflict creates a "genuine" issue of material fact. As this Court points out, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.* at 249 (citations omitted). The court of appeals had the benefit of *Reeves* when it issued its decision in this case and remained

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[7] Respondent acknowledges this Court's treatment of Rule 50 and 56 issues using the same standards, but the fact cannot be lost that *Reeves* involved an appeal from a Rule 50 motion for judgment after a trial on the merits in which a jury ruled against an employer in an age discrimination case brought pursuant to 29 U.S.C. § 621, *et seq*.

[8] *Reeves* cites *Anderson v. Liberty Lobby, Inc.* throughout its entire analysis, and in no way changes or modifies the analysis mandated by *Anderson* for purposes of a court's initial appraisal in these determinations. *Reeves*, ___ U.S. ___, 120 S.Ct. at 2110.

consistent with this Court's opinions on summary judgment standards when it determined that there was no genuine issue for trial.[9]

The court of appeals reviewed the evidence and the inferences from it in the light most favorable to the petitioners. *Anderson v. Liberty Lobby, Inc.* at 255. In doing so, the appellate court was guided by this Court's *Gebser* Title IX standards. *Cf. Anderson v. Liberty Lobby, Inc.* at 255 (The determination of whether a given factual dispute requires submission to jury must be guided by the substantive evidentiary standards that apply to the case.).

(1) J.H.'s Claims

Petitioners' claim the Fifth Circuit somehow failed to follow *Reeves* when analyzing Ms. Patrick's actions involving her investigation of J.H.'s claims. To the contrary, the court of appeals applied the substantive evidentiary standards for a Title IX case to the uncontroverted and unimpeached summary judgment evidence. To survive summary judgment, petitioners had to offer substantial "genuine" evidence that Ms. Patrick (1) was an official who at a minimum had authority to address the alleged discrimination and institute corrective measures, (2) had actual notice of discrimination, and (3) acted with deliberate indifference. *See Gebser* at 292.

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[9] *Reeves* was issued on June 12, 2000, while *Doe II* was issued July 24, 2000. In fact, the Fifth Circuit acknowledged *Reeves* in a case issued before *Doe II*. *See Vadie v. Miss. State Univ.*, 218 F.3d 365 (5th Cir. 2000) (issued July 5, 2000, 19 days before *Doe II*).

Reviewing all the evidence in the record in the light most favorable to petitioners, the appellate court assumed that Patrick was an official who had authority to address the alleged discrimination and had actual notice of discrimination against J.H. in 1984. *See Doe II* at 384. But petitioners could offer no evidence upon which a reasonable juror could say that Ms. Patrick acted with deliberate indifference as a matter of law.

Looking at the evidence in the light most unfavorable to DISD and most favorable to petitioners, the evidence is uncontroverted that: Ms. Patrick met with all involved, gave J.H. and the parent the opportunity to confront McGrew, and asked McGrew point blank whether the accusation was true. *Doe II* at 387. Ms. Patrick then gave McGrew a verbal warning, and followed up by speaking with the other teacher involved to try to verify J.H.'s claims. *Doe II* at 388. Nothing in the record indicates McGrew ever made sexually inappropriate contact with J.H. again.

Gebser makes it clear there must be an official decision not to remedy the violation to constitute "deliberate indifference." *Gebser* at 290. One must remember that Ms. Patrick's investigation of J.H.'s complaint took place in 1986, over ten years before she and the DISD had the benefit of *Gebser*, and long prior to this Court's decisions in *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and the Fifth Circuit's decision on teacher to student sexual harassment, *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n. 12 (5th Cir.) (*en banc*), *cert. denied sub nom., Lankford v. Doe*, 513 U.S. 815 (1994). In spite of the ten years difference, DISD and Ms. Patrick investigated and

gave a warning, meeting the 1998 standards set forth by this Court in *Gebser*.

Petitioners have only their self-serving allegations to offer as evidence that Ms. Patrick was deliberately indifferent, which is not sufficient to withstand summary judgment. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (Plaintiff cannot rest on mere allegations but must set forth by affidavit or other evidence specific facts.) There is no evidence in the record to support a showing of deliberate indifference. In deciding that Ms. Patrick was not deliberately indifferent, the court of appeals was not acting as a fact-finder but rather was applying, as a matter of law, the uncontroverted and unimpeached evidence in this case to the legal standards for summary judgment in a Title IX case.

(2) D.D.P.'s Affidavit(s)

Petitioners allege a second student, D.D.P., informed Ms. Patrick of inappropriate conduct by McGrew. Petitioners proffered an affidavit (by D.D.P.) in 1988 saying that in 1984 McGrew had touched his genitals and that he "went down to the office and told Ms. Patrick . . . about what happened." *Doe II*, at 385. However, in 1996, after this lawsuit was filed, D.D.P. clarified what happened when he went "down to the office":

> In his deposition, D.D.P. stated that McGrew had touched his genitals . . . [and] that he told the administrative staff in Patrick's office of McGrew's act, but that Patrick was actually in her office, talking on the phone, at the time. When asked 'You never actually had a conversation with Ms. Patrick about what Mr. McGrew

> did to you, did you?' D.D.P. answered, 'No.' D.D.P. also stated that he never put his accusation in writing.

Id. In 1999, petitioners attached to their response to DISD's motion for summary judgment an affidavit by D.D.P. that in 1996 he "did not have enough memory of what really happened to allow [him] to testify fully and accurately. . . . " *Id.* During his 1996 deposition, D.D.P. was represented by counsel and responded to multiple questions by stating he could not answer them because he did not recall what had happened. The court of appeals found:

> [I]n his 1996 deposition, D.D.P. responded to certain questions by stating that he could not answer because he did not recall what had happened. Thus, he knew that if he did not remember whether a particular event occurred or the details of how that event had occurred, he could say 'I do not recall' in response to a question regarding that event during his deposition. However, he failed to do so when asked whether he directly told Patrick about the abuse.

Doe II at 386-387. When asked about what he directly told Ms. Patrick, he unequivocally testified that he had not had a direct conversation with her. *Doe II* at 386.

Petitioners also claim the court of appeals "disregarded" the 1999 affidavit. Petition at 7. This is simply inaccurate. The court of appeals spent a page and a half analyzing, not disregarding, the sufficiency of the 1999 D.D.P. affidavit to determine whether it created a "genuine" issue of material fact. *See Doe II* at 385-386.

The only minor issue for this Court to consider is whether a party can manufacture a genuine dispute of fact merely to defeat a motion for summary judgment by introducing an affidavit conflicting his own deposition testimony. Although this Court has never directly ruled on this issue,[10] the circuits remain constant in having rejected similar attacks on summary judgment motions. *See S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 137 n. 23 (5th Cir.), *cert. denied*, 506 U.S. 845 (1992); *Perma Research and Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2nd Cir. 1969); *Camfield Tires, Inc. v. Michelin Tires Corp.*, 719 F.2d 1361, 1365-66 (8th Cir. 1983); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). *See also generally* 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2726 (3rd ed. 1998).[11] While not wishing to seem

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[10] This Court mentions sham affidavits in describing the background of a case in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 367 (1966).

[11] The Fifth Circuit recognizes that there are cases where a nonmovant may offer a sufficient explanation in support of its later-made affidavit to create a credibility or other fact issue. *See S.W.S. Erectors*, 72 F.3d at 495-96. However, this is not a case where petitioners' subsequent affidavit merely supplemented or clarified his earlier deposition testimony because D.D.P.'s subsequent affidavit was drafted for the sole purpose of contradicting his sworn deposition testimony in an effort to avoid summary judgment. Nor is this a case where D.D.P. was outwitted or confused by opposing counsel in his deposition and sought to clarify his testimony by later affidavit. Counsel's questions were straightforward and D.D.P. never claimed to have misunderstood the questions asked of him. *Doe II* at 386-387.

presumptuous, respondent would submit that this consistency by the lower appellate courts is why this Court has never seen fit to write on the subject. *Cf. Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 802 (1999) (This Court opted to let the law on this issue remain as it is).

This approach is consistent with this Court's opinion in *Anderson v. Liberty Lobby* which states that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson* at 247-248.

Petitioners' proposition is that any party can avoid summary judgment by simply submitting an affidavit in response to summary judgment evidence directly contradicting his own deposition testimony, thereby creating a fact question. If that were the case, there would be few, if any, summary judgments. *See, e.g., Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2nd Cir. 1996)["If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." (citations omitted)]. According to petitioners, they can take an oath and be deposed, then take an oath and directly deny and contradict themselves in a post-deposition affidavit, avoid summary judgment and simply place themselves before a jury to decide which story is more credible. That is an affront to the summary judgment process and a mockery of the discovery procedures.

In the end, the court of appeals correctly and tactfully found that the 1999 affidavit was an attempt by a nonmoving party to manufacture a dispute merely to defeat a motion for summary judgment (i.e., there was no *genuine* issue for trial). Both the trial and intermediate courts considered all the evidence in the record, including D.D.P.'s previous testimony in his deposition, and concluded there was no *genuine* issue of material fact. Petitioners' claim that analyzing D.D.P.'s attempt to manufacture a dispute merely to defeat a motion for summary judgment was "judicial activism." Petition at 8. To the contrary, it was *stare decisis*, applying previous standards as set forth by this Court to the facts at hand – and proper in all respects.

(3) Rule 803(5)

The Petition requests this Court broaden FED.R.EVID. 803(5) and make it a King's X against summary judgment. Specifically, petitioners claim that Rule 803(5) should permit parties who admit matters during deposition and later claim they no longer remember material facts to withdraw their admissions and testimony through an affidavit after the deposition. According to the Petition, Rule 803(5) should bar summary judgment motions and make everything a jury question. That would mean the use of depositions for summary judgment will be wholly thwarted, and every case will have to go to a jury.[12]

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[12] Ironically, petitioners argue the 1988 affidavit was "fresh" in D.D.P.'s mind, even though it was written by the police four years after the incident took place. *Doe II*, at 385. D.D.P.'s affidavit, however, was not introduced until *after* the

The court of appeals was flawless in its analysis of Rule 803(5), and petitioners' attempt to use it to negate D.D.P.'s entire deposition. That is not the purpose of Rule 803(5), and both courts saw through this argument. Rule 803(5) is used to refresh recollection when a party cannot remember something, not to materially change sworn testimony once a party realizes the admission could lead (and did here) to summary judgment.

B. *Farmer v. Brennan*

Petitioners claim "[d]espite its relevance, the Fifth Circuit opinion completely disregards *Farmer*." Petition at 10. To the contrary, the court of appeals' opinion cited *Farmer* twice in its opinion. While the court of appeals' opinion is in no way inconsistent with the *Farmer* decision, petitioners ask this Court to analyze apples and oranges – *Farmer* analyzed the 8th Amendment, while this case involves Title IX.

Farmer involved the liability of prison officials and cruel and unusual punishment, and the requirements to protect those in a "special relationship." When analyzing 42 U.S.C. § 1983, this Court has repeatedly recognized

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court of appeals ruled petitioners did not show deliberate indifference in its § 1983 cause of action, when they stated, "if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim." *Doe I*, 153 F.3d at 220 n. 8, cited in *Doe II* at 382. Upon notice that they needed "new evidence," petitioners created D.D.P.'s 1999 affidavit contradicting his deposition testimony in the record.

schools as having different standards than prisons.[13] *See New Jersey v. T.L.O.*, 469 U.S. 325, 338-339 (1985) ("We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) ("The prisoner and the schoolchild stand in wholly different circumstances. . . . ").[14] The Fifth Circuit even cited *Farmer* in *Johnson v. Dallas Indep. Sch. Dist.*, holding that the special relationship of a student to a school is not analogous to a prison:

> There can be no liability of state actors . . . unless the fourteenth amendment were to make schools virtual guarantors of student safety – a rule never yet adopted even for those in society, such as prisoners or the mentally ill or handicapped, who are the beneficiaries of a 'special relationship' with the state.

Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 203 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), citing *Farmer v. Brennan* as an example.[15]

This is not a § 1983 case. Petitioners have petitioned this Court only under Title IX, and the proper analysis is

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[13] This Court in *Gebser* found the standards of deliberate indifference in Title IX to be comparable to the standards under § 1983. *Gebser* at 291.

[14] In *Ingraham*, this Court found corporal punishment by schools does not reach the level of a violation of the 8th Amendment.

[15] This Court in *Farmer* recognized the unique situation posed by prisoners, in that the government has "stripped them of virtually every means of self-protection and foreclosed their access to outside aid." *Farmer*, 511 U.S. at 833.

found in *Gebser v. Lago Vista Indep. Sch. Dist.* Liability will lie only if there is actual notice to an official with authority to stop the discrimination **and** deliberate indifference. *Gebser* at 292. The lower courts correctly applied the definition of deliberate indifference in finding Barbara Patrick was not deliberately indifferent under the circumstances. The court of appeals found:

> Patrick interviewed J.H., spoke with his mother, spoke with J.H.'s teacher, spoke with McGrew and warned him either that he would be "dealt with" if the accusations were founded or that he should avoid acting in a way that could be misconstrued.

Doe II at 388. Even *Farmer* found that deliberate indifference "entails something more than mere negligence . . . something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer* at 835. Because Ms. Patrick responded reasonably to the risk of harm, the DISD avoids liability, "even if the harm ultimately was not averted." *Id.* at 844.

CONCLUSION

Petitioners' petition sets forth no new or unique issues of law, but rather seeks to have this Court reconsider its 1998 decision in *Gebser*. Respondent urges this Court to deny this petition in all respects, and grant respondent all relief it deems appropriate, both in equity and in law.

Respectfully submitted,

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